In the Supreme Court of the United States.

OCTOBER TERM, 1918.

ALEXANDER BERKMAN AND EMMA GOLDMAN, plaintiffs in error,
v.
THE UNITED STATES OF AMERICA. } No. 865.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF CASE.

The plaintiffs in error were indicted for conspiracy to violate the Selective Draft Law of May 18, 1917, 40 Stat., 75. Pursuant to orders of court (Rec. 12, 13), they deposited in the registry of the District Court for the Southern District of New York certain monies in lieu of bail. They were convicted and sentence executed upon them (*Goldman and Berkman* v. *United States*, 245 U. S. 474). Subsequently the amount deposited was returned to them less the clerk's fee of 1 per cent allowed by Section 828, R. S. They thereupon moved the court for an order directing the clerk to pay to them this 1 per cent (Rec. 13). This motion was denied (Rec. 3, 4), and to this order of the court the present writ of error was sued out (Rec. 1),

The District Court rendered an opinion (Rec. 28) in which he mainly relied upon his former opinion in a similar case of Givanitti—printed as an appendix to this brief. In the latter opinion the court held that the clerk was clearly entitled, under the express provision of Section 828, R. S., to 1 per cent of money deposited with him in lieu of bail, and that, as between the United States and the defendants, the latter must pay it, since the United States was not liable for costs of this character in the absence of a statute expressly so providing.

ASSIGNMENTS OF ERROR.

The assignments of error (Rec. 25–27) are:

1. The court erred in construing Section 828, R. S., as authorizing the deduction by the clerk of a fee of 1 per cent.

2. The court erred in not following the State practice which is claimed to be favorable to the motion.

3. Section 828, R. S., as construed by the court, is unconstitutional because

(*a*) It takes defendants' property without due process of law (Amendment V);

(*b*) It discriminates between those who give cash bail and those who do not, in violation of Article IV, Section 2, Subdivision 1, and of Amendment XIV, of the Constitution;

(*c*) It authorizes an unreasonable seizure (Amendment IV);

(*d*) It constitutes excessive bail (Amendment VIII).

Passing for the moment the alleged constitutional questions, the points involved in the case are

1. Whether the right of the clerk to the 1% and the person liable to pay it are to be determined by the State practice or by the statutes of the United States and the decisions of the Federal courts;

2. Whether the clerk is entitled at all to retain 1% of money deposited in lieu of bail;

3. If he be entitled to retain it, should it be deducted from the money deposited, at the expense of the defendant, or should it be paid by the United States?

ARGUMENT.

I.

The Constitutional questions are frivolous, and the writ of error should be dismissed.

The plaintiffs in error are not entitled to come directly from the District Court to this Court on the question of the construction of the statutes of the United States, or the decisions of the courts thereon, by a mere claim that the Constitution is involved. *Judicial Code*, Section 238; *Rakes* v. *United States*, 212 U. S. 55, 58; *Lamar* v. *United States*, 240 U. S. 60, 65. They must, therefore, assume a construction of the statutes against them, and their claim must be that Congress has no power to enact that a defendant shall pay poundage to the clerk on money voluntarily deposited by him in lieu of bail. Such a claim is frivolous, the provisions of the Constitution referred to by plaintiffs in error having no application. It is not taking property without due process of law to compel a party to a cause to pay for services rendered

at his voluntary request and for his benefit. Costs may constitutionally be taxed. *Farmers' Ins. Co.* v. *Dobney*, 189 U. S. 301, 304; *Missouri, Kansas & Texas Ry.* v. *Cade*, 233 U. S. 642, 651, 652; *Meeker* v. *Lehigh Valley R. R.*, 236 U. S. 412, 432.

Nor is Article IV, Section 1, or Article XIV of the Amendments, of the Constitution any more applicable. Each applies only to State action. *United States* v. *Harris*, 106 U. S. 629, 643.

If it be assumed that the United States is prohibited by implication from discrimination between persons (See *United States* v. *Heinze*, 218 U. S. 532, 546), there is nothing arbitrary or grossly unfair in distinguishing between those defendants who give recognizance with surety and those who give cash bail, requiring the latter to pay a fee for the safekeeping of the money. It is in no sense a discrimination. The service of holding the deposit is not performed for those who give a bond with surety. In the absence of statute, money can not be taken in lieu of bail, *United States* v. *Faw*, 1 Cranch. C. C. 486, *State* v. *Owens*, 112 Iowa, 403, 407, and cases cited. The statute which grants this privilege may constitutionally require that the person exercising it shall be subject to the burdens necessarily involved.

The points as to unreasonable search and seizure and excessive bail, if the plaintiffs in error are in any position to raise them on this application, need only be stated to demonstrate their lack of substance.

II.

The right of the clerk to charge a commission, and the obligation of the plaintiffs in error to pay it is to be determined by the law of the United States and not by the law of New York.

Section 1014, R. S., provides, in so far as material:

> For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail; * * * or by any chancellor, judge of a supreme or superior court, * * * or other magistrate, of any State where he may be found, *and agreeably to the usual mode of process against offenders in such State*, and at the expense of the United States be arrested and imprisoned, or bailed as the case may be * * *. [Italics ours.]

The claim of the plaintiffs in error is that, since under Section 586 of the Criminal Code of New York money may be deposited in lieu of bail and it is expressly provided that such money shall be returned on termination of the proceedings, the same procedure must be adopted in the United States Courts which, in this respect, are required by Section 1014 to follow the State law.

The answer to this is that Section 586 of the Criminal Code of New York is a mere municipal regulation, addressed to the courts of that State, and inapplicable to courts of the United States. The section provides that the justice or magistrate taking money in lieu of bail shall deposit it in the same manner as is

provided by law for the payment and deposit of money with the clerk of such court. Evidently a federal magistrate receiving money in lieu of bail could not lawfully deposit it as required by the New York law, but could only act under authority of a law of the United States. If there be no such law, the Federal magistrate has no power to take cash bail. (See *United States* v. *Faw*, 1 Cranch C. C. 486.) In the present case the deposit was made with the United States District Court, evidently under the authority given or implied in Sections 828, 995, and 996, R. S., and Section 99, Criminal Code. Having acted under this authority, the plaintiffs in error are restricted to the question of the construction of these and germane federal statutes and the decisions thereon, without reference to the State law. The case in this aspect is similar to *Duncan* v. *Darst*, 1 How. 301, and *Gwin* v. *Breedlove*, 2 How. 29. In the former case the Court said (1 How. 306):

> It follows, that a State law, regulating the practice of State courts, and addressed to its judges and magistrates; but which can only be executed by them, or with their aid, is a peculiar municipal regulation; not adopted by the acts of Congress, nor applicable to the courts of the United States.

Compare *United States* v. *Ewing*, 140 U. S. 142, 144, with *United States* v. *Patterson*, 150 U. S. 65.

Further, the money deposited is returned on the termination of the proceedings. The person entitled to it owes 1% for the service of the clerk

in respect to it. The clerk deducts it as a credit due to him in accounting for it in full. If the defendant paid the charge he would receive the full amount originally deposited.

III.

The clerk was entitled under Section 828, R. S., to a fee of 1 per cent on money deposited in lieu of bail.

1. The order of court in the case at bar provided:

> That the sum of 25000 Dollars, cash, be deposited in the Registry of this Court in lieu and place of bail for the appearance of the above-named defendant before the United States District Court for the Southern District of New York, in accordance with the provisions of the recognizance to be given by said defendant Emma Goldman. (Rec. 12.)

2. Sections 995 and 996, R. S., provide for

> moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court,

their custody and withdrawal. Section 99 of the Criminal Code punishes the failure of the clerk to duly deposit money "belonging in the registry of the court," and his embezzlement thereof. Section 823, R. S., provides that

> the following and no other compensation shall be taxed and allowed to * * * clerks of the district courts.

Section 828, R. S., constituting the clerk's fee bill, provides *inter alia:*

> For receiving, keeping, and paying out money, in pursuance of any statute or order of court, one per centum on the amount so received, kept, and paid.[1]

3. The facts of the present case bring it squarely within Section 828, R. S. The money was, on order of court, and with the consent of defendants, "received, kept, and paid" by the clerk. The section applies to money received in criminal cases. *United States* v. *Kurtz*, 164 U. S. 49, 53. The clerk performed the services required of him by the court, and is entitled therefore to the fee granted by law. In *United States* v. *Van Duzee*, 140 U. S. 169, 176, 177, this Court said:

> When the clerk performs a service in obedience to an order of the court, he is as much entitled to compensation as if he were able to put his finger upon a particular clause of a statute authorizing compensation for such such services.

Even if the United States Courts have no power to accept cash bail, the plaintiffs in error, having voluntarily given such bail in order to obtain freedom, are estopped to set up the lack of power, and must take the lawful burdens with the benefits. *Casper* v. *Rivers*, 95 Miss. 423; *Smart* v. *Cason*, 50 Ill. 195; *State* v. *Reiss*, 12 La. Ann. 166; *State* v. *Owens*, 112 Iowa 403; *Souskelonis* v. *New Britain*, 89 Conn. 298.

[1] The functions of the clerk as to monies paid into court are fully discussed in *Howard* v. *United States*, 184 U. S. 676, 683–687.

The only decision which has been found that the clerk is not entitled to this fee is that of the District Court for Porto Rico in *United States* v. *Cook*, 7 P. R. Fed. 28. It rests upon the argument that the money is taken simply in place of a recognizance; as no fee could be charged under this heading for a recognizance, none can be charged for the money. The reasoning is unsatisfactory, since it fails to deal with the language of the statute—the controlling feature.

> Fees allowed to public officers are matters of strict law, depending upon the very provisions of the statutes. They are not open to equitable construction by the courts nor to any discretionary action on the part of the officials. *United States* v. *Shields*, 153 U. S. 88, 91.

In the present case the money *was* received by the clerk under an order of court, *was* kept and paid by him in his capacity as clerk, and the statute grants him a fee therefor. The application of the statue cannot be avoided because in other—it may be similar—cases Congress has not granted to the clerk a similar fee.

IV.

The plaintiffs in error—and not the United States—are liable for the clerk's fee.

1. Assuming that the clerk was entitled under Section 828, R. S., to a fee for money deposited in lieu of bail, the sole remaining question is whether this fee

of costs against the United States. Section 856, R. S., provides that

> the fees of * * * clerks * * * in cases where the United States are liable to pay the same, shall be paid on settling their accounts at the Treasury;

but this must be taken to apply only to fees for services rendered the United States, other fees being payable by the parties liable for them (R. S. 857). So section 981, R. S., providing for taxation against the United States of witnesses before a commissioner, clearly refers to the cost of testimony on behalf of the Government.

On the other hand Section 152, R. S., relating to costs against United States from the time of joining issue in the Court of Claims; Section 5 of the Act of July 20, 1892, 27 Stat., 252, providing that the United States shall not be liable for the costs of a suit *in forma pauperis;* Sections 975, 976 and 3214, R. S., relating to costs in cases where an informer is involved; Section 970 relating to costs in admiralty seizures for violation of an act of Congress; all imply that as a general thing the United States is not liable for any costs other than its own; and this rule is evidently applicable to the case at bar, since no statute specifically makes the United States liable for the defendants' costs in such a case as the present.

4. The question therefore resolves itself to this: Was the cost involved in the custody by the clerk of the money deposited by defendants incurred at the instance of, on behalf of, or for the benefit of the

United States? If it was, the United States should pay it, just as any other item of its own costs. If it was not, the United States is not liable for it, and the burden of it, therefore, necessarily falls on defendants.

In *United States* v. *Ewing*, 140 U. S. 142, 146, it was held that a United States Commissioner was entitled to charge for an acknowledgment of defendant's sureties in a criminal case, because Section 828 R. S., allowed the clerk a fee for taking an acknowledgment. This was followed in *United States* v. *Barber*, 140 U. S. 164, 166, 167, where this court said:

> The fourth series of items relates to charges in connection with the recognizances of defendants for examination. We have already held in *United States* v. *Ewing, ante*, 142, that a charge for the acknowledgment of recognizances was proper, though but one acknowledgment for each recognizance can be allowed. There is no valid objection to the allowance for the oaths of sureties and the jurats to such oaths. It is usual and proper to require that persons offering themselves as sureties for the appearance of the accused in court shall justify to their pecuniary responsibility, and the expense of their so doing stands upon the same footing as the recognizance itself. It is true that the taking of recognizance or bail for appearance is primarily for the benefit of the defendant, and in civil cases it is usual to require the costs of entering into such recognizances to be

On the other hand the cost of furnishing a formally complete "bail" must be borne by defendant. (*Jones's Case.* See also *United States* v. *Allred*, 155 U. S. 591, 596, pt. 2.) Thus the cost of indemnifying the surety, or of the premium, if the bond be procured from a surety company, is the defendant's. In an equal degree, if the defendant be unable to furnish a bond and be driven to exercise his privilege to deposit cash in lieu of bail, such cash "bail" is not formally complete until it is deposited in safe custody, promptly available on default. Just as the seal is necessary to a recognizance, so the seal of the registry of the court is necessary to cash "bail," and the cost of this seal, in one case as in the other, must be borne by defendant.

5. The attention of the Court should also be called to that portion of Section 1014, R S., providing that the preliminary proceedings before the examining magistrate, including bail, shall be "at the expense of the United States." This provision, however, is not applicable to the case at bar because it does not appear that the cash bail in question was given in preliminary proceedings governed by this section. On the contrary, it appears to have been given generally for all purposes for which bail is permitted under Section 1015, R. S.

Moreover, it is clear that the language referred to is merely intended to assure the magistrates, Federal or State, before whom the proceedings are brought, that the United States will guarantee their costs in the arrest and binding over of criminals; not

that the United States, as between itself and a person convicted of violating its laws, will in all cases bear the expense of his arrest, detention, or liberation on bail.

V.

THE BALES CASE.

The plaintiffs in error rely on the confession of error made by the United States in *Bales* v. *United States*, No. 895, October Term 1917. That case, however, differed from the present.

In the present case the defendants were convicted, in the *Bales* case the defendant was improperly arrested and was dicharged without indictment. Had the United States been liable for costs, judgment therefor could properly have been rendered against it.

In the case at bar, however, while the court did not in the sentence formally adjudge costs against the defendants, the Government prevailed and convicted them so that *they* had no right to a judgment for costs against the United States—even if it was subject to pay costs.

CONCLUSION.

It is submitted that the writ of error should be dismissed for lack of jurisdiction or the judgment of the District Court affirmed.

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APRIL, 1919.